

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 74-1826

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

VS.

ROBERT S. SCIOLINO,

*Appellant.*

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APPEAL FROM THE JUDGMENT OF CONVICTION IN THE UNITED  
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
NEW YORK IN INDICTMENT NUMBER 1973-137.

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**BRIEF FOR APPELLANT**

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No. 74-1826.

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UNITED STATES OF AMERICA,

*Appellee,*

vs.

ROBERT S. SCIOLINO,

*Appellant.*

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On Appeal from the United States District Court  
for the Western District of New York

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**BRIEF ON BEHALF OF APPELLANT**

**Issues Presented**

1. Whether the verdict of the jury was contrary to law and against the weight of evidence.
2. Whether it was highly prejudicial to admit certain testimony from the principal Government witness over objection.
3. Whether the court's charge as to the second count of the indictment was correct under the law.

## Statute Involved

### United States Code, Title 26

**§ 7212. ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS.**

**(a) CORRUPT OR FORCIBLE INTERFERENCE.**

—Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family (Aug. 16, 1954, c. 736, 68A Stat. 855).

## Preliminary Statement

The appellant was charged in a two-count indictment, filed on March 21, 1973, with having violated Title 18 United States Code § 111, in the first count, and, Title 26 United States Code § 7212(a), in the second count (A2).\*

The trial of this indictment was held in the United States District Court for the Western District of New York on April

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\*Refers to pages in the Appendix.

29th and 30th, and May 2nd, 1974, before the Hon. Floyd F. MacMahon, visiting United States District Judge, and a jury. On May 2, 1974, the jury acquitted the appellant on the first count of the indictment and found him guilty on the second count of the indictment, that is, the count charging a violation of Title 26 United States Code § 7212(a).

Thereafter, and on May 30, 1974, the appellant was sentenced to a term of imprisonment for one year and fined the sum of \$3,000.00. The appellant was ordered to serve three months of the sentence, and, execution of the remainder of the sentence was suspended and the appellant was placed on probation for nine months. In addition thereto, the appellant was ordered to stand committed until the fine of \$3,000.00 was paid (A14).

A timely notice of appeal was filed on May 2, 1974 (A16).

### **Statement of Facts**

Sometime prior to July 20, 1972, Thomas S. Shea, an Internal Revenue Agent, was ordered to conduct an audit of the books and tax returns of the Main-Chrysler Plymouth Corporation, a firm located in Buffalo, New York, of which the appellant was the president. The books and tax returns of the appellant and his wife were also audited for the years 1970 and 1971. Although the question of any deficiencies which were assessed against the corporation and against the appellant and his wife individually did not arise on the trial because of possible prejudice to the appellant, nevertheless, in the Government's amended bill of particulars (A12), there is set forth certain deficiencies for the years 1970 and 1971 which should indicate that the audit of the corporation, as well as of the individuals, certainly had to have been completed by the date of the amended bill of particulars, which was April 11, 1974, and sometime prior thereto. During the

course of the Government's direct examination of Agent Shea regarding an incident wherein the appellant took a flash picture of Agent Shea while he was conducting his audit, without the agent's permission, Shea was asked what did he tell the appellant at that point, to which Shea answered that the appellant stated: "That's for posterity, so I can show it around and say this is the guy." He was then asked by counsel for the Government as to what he understood him to mean by "posterity," to which an objection was made by counsel for the appellant, which was overruled (A42). Again, counsel for the Government asked the witness, Shea, what he understood the appellant to mean by "so he can show it around and say this is the guy." Again, objection was made from the counsel for the appellant, which was overruled also (A42).

These events, which were testified to, occurred on August 7, 1972.

Another incident which was introduced on the trial as part of the Government's proof to substantiate the second count of the indictment, occurred on the following day, August 8, 1972. At this time, the agent requested of the appellant the agreement which was in existence between the dealership in Buffalo and the Chrysler Corporation for examination by the agent. At this point, the testimony was that the agent was requested to go into the office of the appellant, who presumably was looking for the agreement, and in the course of doing so, removed from his desk and put on either the desk or the credenza behind the desk an empty Smith & Wesson .38 Chief Special box (A43). The Agent then testified in answer to certain questions by counsel for the Government that the appellant went into a discourse on "the development of the human mind," and he continued "that man was basically an uncivilized being, that they delighted in sports, violence and killing, and that man was basically unpredictable and one never knew what a man might do in a given set of cir-

cumstances." He also stated that "there is no telling what he might not do if backed into a corner and there was no way out." This was then followed by another question by counsel for the Government as to what Agent Shea understood the appellant to mean by this statement that he did not know what he would do if he were cornered and had no escape. Counsel for the appellant objected to this as improper and incompetent, and, again, this objection was overruled by the court (A49). On cross examination as to this last series of questions, upon being confronted with certain statements made during his grand jury appearance, Agent Shea admitted that he, Sciolino, did not refer to himself when he said "I don't know what you would do or anyone would do if you were backed into a corner and there was no way out" as was testified to on direct examination by Shea (A87, A88). The answer which was given by Agent Shea regarding the empty gun box incident, which was objected to by counsel for the appellant, and, which was overruled, takes on great significance, since it indicates the personal feelings of the agent, as well as his interpretation of the remarks which were said to have been made by the appellant as follows: "I felt that this was perhaps another attempt to intimidate or to cause me from discharging my duties, and possibly even a threat, in view of the episode of the previous day" (A49, A50).

The only other witness for the Government was Christine M. Giardina, who was employed by the Pistol Permit Department in Erie County, in order to establish for the Government that in fact, pistol permits had been issued to the appellant.

The appellant was the only witness for the defense, and his testimony was contradictory to Agent Shea's testimony as to the purpose of the flashing of the camera, as well as the incident regarding the empty Smith & Wesson gun box.

Finally, in the court's charge to the jury (A248), in describing the statute, the court stated:

"...It differs from the law which applies to Count I which, in addition to a threat of force, also requires an apparent present ability to carry out the threat by inflicting immediate bodily harm, but there is no such second requirement as to the crime charged in Count II. Here the crime is by threat of force, prohibit interference with the performance of a duty by threat of force."

Counsel for appellant excepted to that portion of the charge, which was noted by the court. (A253, A254).

### POINT I

The jury's verdict as to the second count of the indictment was contrary to law and against the weight of the evidence.

The summary of facts set forth hereinabove includes the only evidence which was adduced upon the trial of this indictment against the appellant which would in any way be relevant to a prosecution under Title 26 United States Code, § 7212(a). A reading of the entire record of the trial indicates nothing more unless the statement which was made by the appellant on August 23, 1972, to the effect that he was investigating the agent, is considered to be more than just a bald statement made by the appellant, which had no effect whatsoever on the agent (A52). In examining the reported cases relevant to § 7212(a), there has not been a single reported decision which is factually comparable to the case at bar. All the reported decisions have either involved an actual physical resistance to a search or arrest, or a direct written or spoken threat of violence, usually accompanied by the display of a weapon of some kind. Here, there was no such evidence whatsoever, nor was there any direct written or spoken threat, other than the ambiguous conversations which Agent Shea had testified to on the trial.

In *United States v. Glover*, 321 Fed. Supp. 591 (E.D. Ark. 1970), government agents were investigating a Klu Klux Klan bombing. The defendant placed on the agent's automobile a sticker stating, "The knights of the Klu Klux Klan is watching you," and then later questioned about the sticker, the defendant told the agent, "You already had your first warnings; you won't get a second." Upon the trial, the defendant was convicted, but the trial judge set aside the jury's verdict and directed a judgment of acquittal. In that case, there was not only a direct printed warning pasted to the car, but, in addition thereto, the defendant also told the agent that "he had received one warning and would not receive another." This certainly could not be any more of a direct warning or threat. The court, nevertheless, directed an acquittal. Although this case involved a violation of Title 18 United States Code § 111, nevertheless, the element of a threat or, more particularly, a threat of force, is also relevant to a prosecution under Title 26 United States Code § 7212(a).

The point here made is that the so-called threats which were testified to by Agent Shea were so nebulous in their character as to represent non-specific threats of force, which certainly requires more in order to find a defendant guilty of a violation of the statute. Certainly, taking a flash picture of an Internal Revenue agent, who is in the process of conducting an audit, standing by itself, is far from constituting any direct threat of force, or even of intimidation. Also, placing an empty gun box on a desk or credenza near the agent and then embarking into a discourse about the development of man's mind from the time of the Neanderthal man and the statement that one never knows how the human mind will react when a person is backed up against a wall, is also a non-direct, vague statement, which is far from constituting the direct threat which is required by this statute. Even taking these two instances and combining them with the statement that the appellant was investigating the agent, certainly would

not constitute the proscribed conduct necessary to sustain a conviction under § 7212(a).

At the other end of the spectrum, a comparison should be made between the weak facts in the case at bar with those in *United States v. Varani*, 435 F. 2d 758 (6th Cir. 1970). Here, there were direct threats to kill the revenue agent by statements such as the defendant was an expert rifleman in the Army, that he would blow the agent's head off if he (the agent) or any other agent came on the defendant's property in order to seize any of his assets. On another occasion, the defendant thrust his clenched fist within an inch of the agent's nose. In addition to all of the above, the defendant wrote a highly threatening letter to the agent which left no room for any doubt whatsoever as to its purpose.

As to the element of obstructing or impeding the agent in his duties to perform the audit, the record clearly indicates, one, that he had the full cooperation of the appellant as well as the other employees of the firm, and, two, that he had all of the means available to him to compete his audit (A63-A66).

As to the agreement between appellant and the Chrysler Corporation upon which the agent seemed to place such great emphasis, perfectly legitimate reasons were given by the appellant to the agent as to why he would not give it up. Any taxpayer has this right and if his objections are not well-founded, the agent has a remedy by way of a summons to the taxpayer or a third-party summons to anyone else having possession of the requested document. In any event, Agent Shea did, in fact, receive the agreement in the latter part of August or September of 1972 (A70).

Another fact bearing on this element of the crime is that not once did anyone in the Internal Revenue Service, including Agent Shea, exhibit any alarm over the "threats or acts of intimidation" so as to afford the agent additional protection or even to commence appropriate criminal proceedings against

the appellant. Indeed, the contrary is true, because other than an interruption when the agent was re-assigned, he continued to visit the appellant well after August 7 and 8, 1972, as well as the fact that his relations were amicable with the appellant. In fact, when he was re-assigned to the audit of Main-Chrysler, he had contacts with the firm up to October 14, 1972, when he testified he was carrying a concealed transmitter on his person (A91). Incidentally, this last fact, plus another to be discussed vividly show the *mala fides* on the part of the Internal Revenue Service. The agent gave testimony before the grand jury in the middle of March, 1973, and the indictment was voted and filed on March 21, 1973, some five months after the last contact with the appellant and approximately eight months after the alleged criminal conduct of the appellant occurred.

Lastly, and related to the elements of proof under § 7212(a), the agent was asked whether the audit was ever completed, to which he answered, "No, sir" (A54). However, as stated previously in the statement of facts, the Government's amended bill of particulars indicates that certain deficiencies were assessed against Main-Chrysler Corporation, as well as the appellant and his wife, individually. Under those circumstances, it is difficult to understand how a deficiency can be assessed against a corporation or a person if the agent's audit was never completed.

## POINT II

Certain testimony of Agent Shea which was objected to should not have been admitted, since the answers elicited were highly prejudicial to the appellant.

Certain questions which were asked by counsel for the Government of Agent Shea on his direct examination were highly improper questions, which called for a state of mind of

the agent, as well as a conclusion, and were highly prejudicial to the appellant. This is not a type of prosecution, such as a violation of the Hobbs Act, where the elements of extortion and fear are necessary elements of proof to sustain a conviction in that type of prosecution, as well as the state of mind of the victim of the extortion. *United States v. Tropiano*, 418 Fed. 2d 1069 (1969), cert. den. 379 U.S. 1021; *United States v. DeMasi*, 445 Fed. 2d 251 (1971), cert. den. 404 U.S. 882. In § 7212(a), the word "fear" is not used. As applicable to this case, it is the "threats of force" which are essential to a conviction, irrespective of the reaction of the agent to the threats of force. Inasmuch as Agent Shea's "state of mind" was completely immaterial to the appellant's guilt or innocence of the crime charged, any proof offered in this respect not only was incompetent and immaterial, but also was extremely prejudicial to the appellant.

Unlike the crime of extortion, Agent Shea's "state of mind" was completely immaterial to the crimes charged against the appellant. What he thought was impelling the appellant to do what he did, had no proper evidentiary bearing on whether or not the appellant, "by threats of force," tried to intimidate and impede the audit. In order to sustain a conviction under this section, the proof has to be objective, this is, the prosecution must stand or fall solely on the conduct alleged to have been engaged in by the appellant and not on the agent's subjective beliefs and opinions as to what the appellant intended during the incidents upon which this prosecution was based.

In the picture-taking incident (A41, A42), this exchange occurred:

"Q. All right, sir. Did you say anything to Mr. Sciolino?

A. I said, 'What was that for?'

Q. What, if anything, did he say to you?

A. He said, 'That's for posterity, so I can show it around and say this is the guy.'

Q. Now, what did you understand him to mean by 'posterity?'

Mr. McDonough: I object to what he understood him to mean.

The Court: Overruled.

By Mr. Stewart:

Q. You may answer.

A. Future generations."

It is submitted that what a witness understands someone to mean is never a proper question because each person's interpretation of what a person says could vary greatly with the individual, and in some instances, as in the case at bar, could become very prejudicial to a defendant.

Again, considering the empty Smith & Wesson gun box, the following exchange again occurred:

"By Mr. Stewart:

Q. Now, what did you understand him to mean by his statement that he didn't know what he would do if he were cornered and had no escape?

Mr. McDonough: I object to this, improper and incompetent.

The Court: Overruled.

By Mr. Stewart:

Q. You may answer.

A. I felt that this was perhaps another attempt to intimidate or to cause me from discharging my duties, and possibly even a threat, in view of the episode of the previous day." (A49, A50).

In this instance, in the first place, the gun box was empty, as well as the fact that during none of the incidents testified to by the agent, was a weapon ever displayed to him in the course of any conversations with him. In addition, the above-quoted answer of the agent, that he felt it was perhaps another

attempt to intimidate him or to prevent him from discharging his duties, and possibly even a threat, goes right to the heart of the prosecution under § 7212(a), since it involves the agent's state of mind, which was highly prejudicial. One may take a very, very timid person, who could interpret the remarks which were alleged to have been made by the appellant to be direct threats to kill him, whereas, on the other hand, a more sturdy individual would pay no attention to the remarks whatsoever. Obviously, the appellant's conduct should stand or fall on the basis of that conduct and not on the subjective beliefs of the agent, as in the case at bar, since individual beliefs or interpretations of stated matter can vary greatly from person to person.

### POINT III

The court erred in instructing the jury on the elements necessary to convict under the second count of the indictment.

In explaining the elements necessary for a conviction under § 7212(a), the court stated in its charge:

"This law prohibits interference with the performance of a duty by threat of force. It differs from the law which applies to Count I which, in addition to a threat of force, also requires an apparent present ability to carry out the threat by inflicting immediate bodily harm, but there is no such second requirement as the the crime charged in Count II. Here the crime is by threat of force, prohibit interference with the performance of a duty by threat of force." (A248).

This portion of the Court's charge was excepted to by counsel for the appellant and the exception was noted by the court (A253, A254).

There is absolutely no reason why the second count of the indictment does not require an apparent present ability to in-

flict harm in addition to the threat of force as would be required under a prosecution in the first count of the indictment, that is, under Title 18 United States Code § 111. Apparently, the jury took this into consideration because of the explanation given to it by the court as is witnessed by the fact that the jury acquitted the appellant on the first count of the indictment, and, pursuant to the instructions of the court on the second count of the indictment, convicted him of that count.

Therefore, without a direct threat of force as enunciated in the second point of this brief, and without any apparent present ability to execute the threat of force, the proof not only was far below the standard required for conviction under this section, but also, the charge of the court was highly prejudicial to the appellant.

### **Conclusion**

The appellant's conviction should be reversed and the indictment dismissed.

Respectfully yours,

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